APPEAL NO. 93127

Under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on January 27, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not sustain a compensable injury as a result of exposure to chemicals at his place of employment on (date of injury) , that he did not have disability as a result of the asserted injury, and further, that there is no authority for an election of remedies under the 1989 Act. Claimant does not agree with the decision and asks that it be reviewed. He states he wanted a lawyer but could not find one and that the ombudsman did not assist him and was not allowed in the hearing and that he was not prepared and did not understand the proceedings. He also complains that certain of his evidence was not admitted. Respondent (carrier) urges that the evidence is sufficient to support the hearing officer's decision, that there is nothing in the record to indicate that an ombudsman was denied access to the hearing to assist the claimant and that the relevant evidence offered by the claimant was before and was considered by the hearing officer. Carrier asks that the decision be affirmed.

DECISION

We reverse and remand for further consideration and development of evidence as deemed necessary and appropriate.

The claimant, who had been retired from the employer for over a year, was rehired on or about June 1, 1992. He asserts a date of injury of (date of injury), when he first had a blackout or seizure. He testified that his duties involved, among other things, spraying chemicals such as Round-up with a mix of Accumaster for weed control. He had done similar spraying when previously employed by the employer. When he was rehired, he did not disclose that he was diabetic, stating the reason therefor was because, although he was diagnosed and was on medication for his diabetes, he considered himself only "borderline diabetic." In any event, the blackout or seizure episodes he experienced on (date of injury), and again on the 26th or 27th (the record is unclear as to the exact date) were, as testified to by the claimant himself, the result of the diabetes and either a high or low blood/sugar level. In any event, the claimant was hospitalized, a diagnosis of diabetes mellitus made, and the condition alleviated. He was also terminated because of his failure to disclose the diabetic condition and because it was a safety hazard in his duties of operating equipment. As a result of an ad seen on television by his wife, the claimant went to the (EHC) in Dallas, a clinic which claimant understood to be for allergies and chemical exposure. He indicated that he hasn't had "any more trouble since I got away from that stuff up there and got down there to the (EHC) and had this stuff sweated out." A letter report dated September 28, 1992, from a (Dr. R) at the EHC indicates the claimant's stated exposure to Roundup and provides a diagnoses of "chemical exposure, seizures and diabetes mellitus." He gave his opinion that the claimant was totally disabled. Dr. R also opines "[i]t is my medical opinion that (claimant's) medical problems were caused by his exposure at work." A report dated

January 8, 1993, from (WL), PhD, a diplomate of the American Board of Forensic Toxicology seriously questions the reputation, methodology and opinions from Dr. R and the EHC and reviews the records on the claimant. WL opines that "[i]n order for (claimant) to have received a dosage (of the active chemical) significant to cause neurotoxic injury, acute symptoms would have been observed. . . . [t]he only way (claimant) could have consumed this quantity would have been intentional oral intake." He concludes "[t]here is absolutely no evidence to support this claim" (Dr. R's suggestion that Roundup caused the claimant's medical condition.)

The employer's assistant manager testified that the claimant had used the same sprays for a number of years before he retired and that there were no apparent problems. He stated that, contrary to what the claimant stated, he had only sprayed one time when he came back to work and before he had his diabetic attack. The employer's safety director testified that the claimant did not disclose on his rehire physical that he had diabetes and that for safety reasons he would not have been hired for the position of front end loader had it been known he had diabetes.

From this evidence, the hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment and that he did not have disability. Because of the principal reason for this remand, we do not address or otherwise decide the matter concerning the sufficiency of the evidence to support the hearing officer's determinations.

Of concern to us is the claimant's assertion on appeal concerning assistance. In this regard, the record is absolutely silent on the matter and there is no advice, comment, or discussion on the record concerning any right to legal or other representation other than the hearing officer's direct statement "[y]ou're being assisted by your wife, (MP)". The claimant's complaint on appeal states:

> The ombudsman was not allowed to go in the hearing and did not assist me. This process has not been to my benefit. I didn't know how to prepare a case. I was not prepared for what happened in the hearing. I had total lack of assistance. I did not understand law and rules of the hearing.

The troubling matter here, and no help is found in the record, is whether there has been compliance with Article 8308-5.41, the Ombudsman program. Succinctly, that article mandates that the Commission establish an ombudsman program to assist injured workers. This has been implemented in the Texas Workers' Compensation Customer Services Handbook § 4000 *et seq*. Ombudsman. It is also our understanding that in a Memorandum dated February 12, 1993, from the Director of Hearings and Review of the Texas Workers' Compensation Commission, hearing officers have been instructed to make appropriate inquiries on the record concerning Ombudsman services and the desire for such services.

We recognize this hearing preceded this letter, but that is secondary to the principle matter: a claimant's unanswered assertion concerning an ombudsman not being allowed in a hearing and not rendering assistance in accordance with the Act. We return the record for a hearing on the matter and for appropriate action in the event that a substantive or procedural right of the claimant has been somehow abridged.

We also are concerned with the hearing officer's ruling not admitting the medical records offered by the claimant on the basis they were not timely exchanged. The claimant acknowledged that he had not given a copy of the records to the carrier within 15 days of the benefit review conference. The reason he did not do so was because the carrier had already been given a copy at the benefit review conference and the benefit review conference report shows the report as an exhibit. Particularly with a pro se claimant, who unrebuttedly states that a medical record has already been given to the opposing side, that he did not realize he had to give the same record again, and where it is clear that it was an exhibit at the benefit review conference, it would seem reasonable to address the applicability of the good cause exception even if the letter or technical aspect of the exchange requirements have not been complied with. *See generally*, Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992, where we discussed a situation of a failure to exchange documents provided by the opposing party at a benefit review conference. We observed in that case that the discovery rules were not intended to require a reverse exchange of documents obtained as a part of the opposing party's disclosure or to otherwise set up a "perpetual shuttle" of documents between the parties.

For the above reasons, the case is remanded for further consideration not inconsistent with this opinion and development of evidence as deemed necessary and appropriate by the hearing officer. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge